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10 STANISLAV VLADIMIROVICH)
11 AGAPOV,)
12 v. Plaintiff,)
13 PAUL M. PIERRE, District Director, San)
Diego U.S. Citizenship and Immigration)
14 Services Field Office, et al.,)
15 Defendants.)
Case No. 08cv0379 H (WMc)
MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING DEFENDANTS'
MOTION TO DISMISS OR ALTERNATIVELY
TO REMAND TO UNITED STATES
CITIZENSHIP AND IMMIGRATION SERVICES
Date: June 9, 2008
Time: 10:30 a.m.
Crtrm: 13
The Honorable Marilyn L. Huff
[Defendants Do Not Request Oral Argument]

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I.

INTRODUCTION

3 Plaintiff requests that the Court compel Defendants to complete the processing of his
4 naturalization application, however, he has failed to establish the Court's subject matter jurisdiction or
5 to state a claim upon which relief can be granted. The Complaint is therefore subject to dismissal
6 pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiff has not been examined by Defendant U.S.
7 Citizenship and Immigration Services (USCIS) regarding his application for naturalization, and by
8 federal regulation, cannot be examined until USCIS receives the results of his name check pending with
9 Defendant Federal Bureau of Investigation (FBI). Defendants request that the Court dismiss the
10 Complaint for lack of subject matter jurisdiction and failure to state a claim. Alternatively, if the Court
11 finds jurisdiction and that Plaintiff has stated a claim, Defendants request that the Court remand the
12 matter to USCIS for adjudication of the application once the necessary background investigation and
13 subsequent examination are completed.

II.

STATEMENT OF FACTS

16 Plaintiff Stanislav Agapov, a native and citizen of Russia, was granted Lawful Permanent
17 Resident status on March 19, 2002. See Declaration of Janaki Rangaswamy, (Ex. A), ¶ 19.^{1/} On
18 June 15, 2007, Plaintiff filed an Application for Naturalization (N-400). Id. On August 8, 2007, USCIS
19 received the results of Plaintiff's FBI fingerprints check. See Ex. A, ¶ 19. On or about July 12, 2007,
20 the FBI received a name check request from USCIS. See Declaration of Michael Cannon (Ex. B) ¶ 43.
21 To date, Plaintiff's FBI name check is incomplete and ongoing. Id. at ¶ 19; Ex. B, ¶ 43. Further, because
22 Plaintiff's FBI name check has not been completed and he has not been examined, his N-400 application
23 remains pending. See Ex. A, ¶¶ 19-21.

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26 ^{1/} When considering a motion to dismiss pursuant to Rule 12(b)(1), the district court may
27 review evidence outside the pleadings to resolve factual disputes concerning the existence of
28 jurisdiction without converting the motion to one for summary judgment. See, e.g., Land v. Dollar, 330
U.S. 731, 735 n.4, (1947) (“when a question of the District Court’s jurisdiction is raised...the court may
inquire by affidavits or otherwise, into the facts as they exist.”); Biotechs Research Corp. v. Heckler,
710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings did not convert a
Rule 12(b)(1) motion into one for summary judgment).

1 III.

2 ARGUMENT3 A. LEGAL BACKGROUND

4 By statute, the Secretary of Homeland Security^{2/} is authorized to prescribe the scope and nature
 5 of the examination of naturalization applicants as to their admissibility to citizenship. 8 U.S.C. § 1443(a).
 6 Judicial review is limited to those applications that have been denied or not decided within 120 days of
 7 examination. See 8 U.S.C. § 1447(a)-(b). Plaintiff's application has not been denied, nor has he been
 8 examined by USCIS. See Ex. A, ¶¶ 19-21. Thus, the Court does not have jurisdiction under 8 U.S.C.
 9 §§ 1421(c), 1447(a), or 1447(b).

10 In a situation where there has been no examination, the governing statutes and regulations do not
 11 provide a time frame for adjudication of a naturalization application. See 8 U.S.C. §§ 1443, 1446, 1447;
 12 6 U.S.C. § 551(d); 8 C.F.R. § 335. Further, Title 8 only provides a mechanism for judicial review where
 13 120 days have elapsed since USCIS conducted an examination in connection with an application or
 14 where an application is denied. See 8 U.S.C. §§ 1421(c); 1447. USCIS is required to examine each
 15 applicant for naturalization. See 8 U.S.C. § 1446(b). The examination takes place in the form of an
 16 interview with a USCIS officer and includes a test of English literacy, basic knowledge of the history
 17 and government of the United States, and questioning on the answers provided in the application itself.
 18 See 8 C.F.R. § 335.2(c). However, regulations enacted in the discretion of the Secretary of Homeland
 19 Security require that the examination only occur after the completion of extensive criminal background
 20 checks and a "definitive response from the Federal Bureau of Investigation that a full criminal
 21 background check of an applicant has been completed." 8 C.F.R. § 335.2(b); Ex. A, ¶ 21. Plaintiff's FBI
 22 name check is currently incomplete and ongoing. See Ex. A, ¶ 20; Ex. B, ¶ 43. Accordingly, no
 23 examination of Plaintiff has taken place and his application remains pending. See Complaint, ¶ 8; Ex. A,
 24 ¶ 21. Therefore, Title 8 does not provide for any judicial review of Plaintiff's complaint because
 25 Plaintiff's application has not been denied and he has not been interviewed. See 8 U.S.C. §§ 1447(a)-(b).

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28 ^{2/} On March 1, 2003, DHS and its USCIS assumed responsibility for the process of naturalization. 6 U.S.C. § 271(b). Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security. 6 U.S.C. § 551(d).

1 B. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION

2 Plaintiff asserts the Court has jurisdiction under 28 U.S.C. §§ 1331, 1361, 1651, 2201, and
 3 5 U.S.C. § 701 et. seq. See Complaint, ¶ 5. These statutory provisions do not vest this Court with
 4 subject matter jurisdiction. This case in all material respects is similar to this Court's recent decision in
 5 Yasmeh v. Mukasey, No. 08cv0024, slip op. (S.D. Cal. April 1, 2008) (copy attached as Ex. E). In
 6 Yasmeh, this Court held that there is no subject matter jurisdiction over complaints regarding a pending
 7 application for naturalization where the FBI name check is pending and USCIS has not conducted an
 8 interview. Yasmeh, No. 08cv0024, p. at 3-7. Other courts in this district have also held that there is no
 9 subject matter jurisdiction over a complaint involving an application for naturalization that remains
 10 pending as a result of an ongoing FBI namecheck. See Dairi v. Chertoff, No. 07cv1014, 2007 WL
 11 3232503, *1 (S.D. Cal. November 1, 2007) ("[T]here appears to be no legal basis for the court to exercise
 12 subject matter jurisdiction over the action to compel Defendants to proceed with the naturalization
 13 interview."); Song v. Chertoff, No. 07cv0855, 2007 WL 3256201, *1 n.1 (S.D. Cal. November 1, 2007)
 14 (holding that there was no jurisdiction under 8 U.S.C. §§ 1447(b), 1421(c) or under any other provisions
 15 cited by plaintiff); Zhou v. Chertoff, No. 07cv0102-LAB, slip op. (S.D. Cal. Mar. 14, 2007) (copy
 16 attached as Ex. F) (same). Similarly here, there is no legal basis to order USCIS to proceed to the
 17 examination because Defendants may not schedule Plaintiff's interview until USCIS receives the results
 18 of the criminal background investigation from the FBI. See 8 C.F.R. § 335.2(b).

19 1. Federal Question Statute Does Not Vest the Court with Jurisdiction

20 Plaintiff asserts the Court has jurisdiction under 28 U.S.C. § 1331, the federal question statute.
 21 Under this statute, a federal court has subject matter jurisdiction where (1) the claim turns on an
 22 interpretation of the laws or Constitution of the Untied States, and (2) the claim is not "patently without
 23 merit." Saleh v. Ridge, 367 F. Supp. 2d 508, 511 (S.D.N.Y. 2005). Here, Plaintiff's complaint fails on
 24 the second prong. As discussed above, Plaintiff's application for naturalization has not been denied and
 25 he has not been examined which leaves him without a mechanism for judicial review. See
 26 8 U.S.C. §§ 1147(a)-(b). Furthermore, Plaintiff may only be examined after his FBI background check
 27 has been completed. See 8 C.F.R. § 335.2(b). Accordingly, as Plaintiffs' FBI name check remains
 28 pending, his Complaint is without merit and should be dismissed for lack of subject matter jurisdiction.

1 2. The Mandamus Act Does Not Provide Jurisdiction

2 The Mandamus Act provides district courts with original jurisdiction of “any action in the nature
 3 of mandamus to compel an officer or employee of the United States or any agency thereof to perform a
 4 duty owed to the plaintiff.” 28 U.S.C. § 1361. However, the availability of mandamus is limited. See
 5 Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 392 (2004)
 6 (Stevens, J., concurring). “Mandamus is an extraordinary remedy and is available to compel a federal
 7 official to perform a duty only if: (1) the individual’s claim is clear and certain; (2) the official’s duty is
 8 nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other
 9 adequate remedy is available.” Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003) (quoting
 10 Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1998)). Relief through § 1361 is only appropriate where the
 11 action to be compelled is nondiscretionary. 28 U.S.C. § 1361; Sung v. Ashcroft, 76 Fed. Appx. 138, 139
 12 (9th Cir. 2003) (citing Kildare, 325 F.3d at 1084). Plaintiff’s Complaint does not resemble those
 13 extraordinary cases in which the Ninth Circuit has held that “drastic” mandamus relief is appropriate.
 14 See, e.g., Barton v. United States District Court, 410 F.3d 1104, 1106 (9th Cir. 2005) (issuing a writ of
 15 mandamus to protect attorney-client privilege); Myers v. United States District Court, 620 F.2d 741
 16 (9th Cir. 1980) (issuing a writ of mandamus to protect constitutional right to a jury trial).

17 Plaintiff’s situation is analogous to the applicant in this Court’s recent decision in Yasmeh. In
 18 Yasmeh plaintiff had not been interviewed and his naturalization application had been pending at least
 19 two years due to an incomplete background investigation from the FBI. Yasmeh, No. 08cv0024, p. 2.
 20 In assessing the basis for jurisdiction, the Court found that the Defendants, USCIS and the FBI, provided
 21 sufficient evidence to demonstrate that the delay in processing plaintiffs’ application was not due to
 22 agency inaction and was directly attributable the time required to resolve the various concerns involved
 23 in a background investigation. Id. at 5. The Court held that it lacks jurisdiction under the Mandamus Act
 24 because “the pace of the investigation and adjudication process before an interview occurs is
 25 discretionary and, therefore, Defendants do not owe a ministerial duty to expedite the processing of
 26 Plaintiff’s application.” Id. Similarly here, the background investigation required in connection with
 27 Plaintiff’s application is ongoing. Ex. A, ¶ 20-21. Congress specifically prohibited Defendants from
 28 adjudicating Plaintiff’s application until they receive a completed background check from the FBI.

1 See Pub. L. No. 105-119, Title I, Nov. 26, 1997, 111 Stat. 2448, 2449. Thus, Defendants cannot act on
2 Plaintiff's application until they receive a completed background investigation. See Li v. Chertoff, 482
3 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007). Accordingly, as in Yasmeh, the pace of adjudication is
4 discretionary because the investigation is ongoing and Defendants do not owe a ministerial duty to
5 expedite Plaintiff's application.

6 Plaintiff's insistence that he has a right to expedited adjudication of his naturalization applications
7 ignores the fact that his FBI namecheck investigation is ongoing and incomplete. See Ex. B, ¶ 43.
8 Moreover, contrary to Plaintiff's allegations of a refusal to act, Defendants are completing their duty to
9 process Plaintiff's application in accordance with law. See Ex. A, ¶¶ 5-6, 19-22; Ex. B, ¶ 43. Defendants
10 have no duty to expedite a law enforcement background investigation because Plaintiff desires the results
11 immediately. Because Defendants are prohibited from acting on Plaintiff's application until they receive
12 a completed background check, Plaintiff cannot establish a clear and certain claim for relief or that
13 Defendants have a plainly prescribed duty to act on his application. Accordingly, Plaintiff is not entitled
14 to relief under 28 U.S.C. 1331 and the Complaint should be dismissed for lack of jurisdiction.

3. The Administrative Procedure Act And The Declaratory Judgment Act Do Not Vest This Court With Jurisdiction

17 The Declaratory Judgment Act, 28 U.S.C. § 2201 (“DJA”), does not provide an independent basis
18 for jurisdiction; rather, it only expands the range of remedies available in federal courts. Skelly Oil Co.
19 v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950). Similarly, the Administrative Procedures Act
20 (“APA”), 5 U.S.C. § 701, et seq., does not provide an independent jurisdictional basis. Califano v.
21 Sanders, 430 U.S. 99, 107 (1977); Staacke v. U.S. Department of Labor, 841 F.2d 278, 282 (9th Cir.
22 1988). Rather, it merely provides the standards for reviewing agency action once jurisdiction is
23 otherwise established. Staacke, 841 F.2d at 282. Furthermore, judicial review under the APA is
24 specifically precluded where “agency action is committed to agency discretion by law.”
25 8 U.S.C. § 701(a)(2). “Agency action,” as defined under the APA, also includes “a failure to act.”
26 5 U.S.C. § 551(13).

27 The APA may confer jurisdiction on the Court where a person “suffering a legal wrong . . . or
28 adversely affected or aggrieved” complains of agency action or inaction. 5 U.S.C. § 702. However, such

1 a claim may only arise where the plaintiff “asserts that an agency failed to take a discrete agency action
 2 that [the agency] is required to take.” Mustafa v. Pasquerell, 2006 WL 488399 at * 2 (W.D. Tex. Jan.
 3 10, 2006) (citing Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)). Plaintiff’s allegation
 4 that his application has not been adjudicated since June 2007 fails to satisfy this standard as a matter of
 5 fact and law. First, the processing of his naturalization application is ongoing. See Ex. A at ¶¶ 22-26.
 6 Second, 5 U.S.C. § 704 limits judicial review to those agency actions made reviewable by statute,
 7 excluding from coverage agency decisions committed to agency discretion by law. See Akpojiyovwi v.
 8 Acosta, No. H-04-3495, 2005 WL 1668133, at *2 (S.D. Tex. Jul. 15, 2005) (citing, in relevant part, 5
 9 U.S.C. § 701 (a) (2)) (internal footnote and citation omitted).

10 Plaintiff asks the Court to order the completion of his background investigation and schedule him
 11 for an interview. See Complaint at Prayer for Relief. However, the FBI is currently working to complete
 12 Plaintiff’s name check and background investigation. See Ex. B, ¶ 43. USCIS cannot complete its
 13 review of Plaintiff’s application, schedule him for an interview, or adjudicate the application until the
 14 necessary background checks are complete. See 8 C.F.R. § 335.2(b); Ex. A, ¶¶ 21-22. APA review of
 15 how, or how quickly, Defendants perform this important national security function is unavailable in this
 16 case.

17 It is well-established that courts generally have no power to order the Executive to undertake a
 18 particular investigation absent some statutory provision conferring this authority. See, e.g., United States
 19 v. Ramos, 933 F.2d 968, 971 n.1 (11th Cir. 1991) (explaining that “[c]riminal investigations are an
 20 executive function within the exclusive prerogative of the Attorney General’s Office”) (citation omitted)).
 21 Where an agency possesses discretion regarding the manner and time of performance of its functions,
 22 courts may only direct the agency “to take action upon a matter, without directing how it should act.”
 23 Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in original) (internal citation
 24 omitted). Here, Plaintiff’s Complaint admits that USCIS informed him that the processing of his
 25 application is pending, awaiting the results of the background investigation. Complaint at ¶ 9. Moreover,
 26 the USCIS and the FBI are working toward completing pending naturalization applications and recently
 27 reduced the projected processing times for naturalization applications. See USCIS Website, USCIS
 28 Updates Projected Naturalization Case Processing Time,

1 http://www.uscis.gov/files/article/naturalization_processing_2apr08.pdf, (attached as Ex. D). In fact,
 2 USCIS and FBI assert that namechecks that have been pending more than one year should be completed
 3 by November 2008. See USCIS Website, USCIS and FBI Release Joint Plan,
 4 http://www.uscis.gov/files/article/NameCheck_2Apr08.pdf, (attached as Ex. C). On such a record, where
 5 submitted evidence avers that the necessary investigation is pending, APA review is unavailable.

6 Similarly, APA review is unavailable to compel the FBI to complete a namecheck because no
 7 statute or regulation imposes any deadline for the FBI to complete a criminal background check. Shalabi
 8 v. Gonzales, 2006 WL 3032413, at * 5 (E.D. Mich. Oct. 23, 2006)(“[C]ourts are ill-equipped to conduct
 9 the type of criminal background checks with which the FBI has been tasked, and to conduct a hearing
 10 without the benefit of a completed background check ‘would contravene Congress’s intent that an FBI
 11 background is to be completed prior to the adjudication of every naturalization application.’”). Congress
 12 could have enacted deadlines for the performance of the FBI’s immigration name checks and could have
 13 subjected this process to judicial review. Congress’s decision not to do so indicates that this process
 14 remains well within the FBI’s sole discretion, and the FBI’s decisions regarding when and how to
 15 complete adjustment of status name checks are not subject to judicial scrutiny. Cf. Haig v. Agee,
 16 453 U.S. 280, 300 (1981) (“congressional acquiescence may sometimes be found from nothing more than
 17 silence in the face of an administrative policy”).

18 Significantly, this Court in Yasmeh recognized that the APA does not provide subject matter
 19 jurisdiction where the agency is not compelled by law to act within a specified period of time or the delay
 20 is unreasonable. Yasmeh, No. 08cv0024, p. 6. Further, the Court held that there are no statutes or
 21 regulations that require either USCIS or FBI to act with respect to the FBI namecheck and background
 22 investigation. Id. Accordingly, as in Yasmeh, the Court lacks jurisdiction to grant Plaintiff relief because
 23 Plaintiff cannot point to a single statute or regulation that imposes a time period within which USCIS
 24 must adjudicate his application or a time period requiring the FBI to complete the background
 25 investigation. Therefore, Plaintiff’s claims for relief under the APA must be dismissed.

26 4. The All Writs Act Does Not Establish Jurisdiction

27 The All Writs Act also does not provide this Court with jurisdiction over the subject matter of
 28 Plaintiff’s Complaint or permit the Court to order the requested relief. Plaintiff’s Complaint improperly

1 pleads § 1651 as a basis for his requested relief. See id.; see also Kerr v. United States Dist. Court, 426
 2 U.S. 394, 402-03 (1976). The All Writs Act provides that Article III courts “may issue all writs
 3 necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles
 4 of law.” 28 U.S.C. § 1651. “The Supreme Court has explained that only ‘exceptional circumstances
 5 amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.’”
 6 United States v. Ye, 436 F.3d 1117, 1121 (9th Cir. 2006) (quoting Will v. United States, 389 U.S. 90,
 7 95 (1967)). Applied to Article II conduct, the use of the All Writs Act is exceedingly rare. See
 8 Confederated Tribes v. Bonneville Power Admin., 342 F.3d 924, 930 (9th Cir. 2003) (“The circumstances
 9 that will justify our interference with non-final agency action must be truly extraordinary, for this court’s
 10 supervisory province as to agencies is not as direct as our supervisory authority over trial courts.”)
 11 (quoting Public Util. Comm’r v. Bonneville Power Admin., 767 F.2d 622, 630 (9th Cir. 1985)). Plaintiff
 12 does not request that the Court issue a writ to protect the jurisdiction of the Court or to effectuate the
 13 Court’s judgment, nor may his Complaint be read to pray for the relief that may be properly granted by
 14 the All Writs Act. See Confederated Tribes, 342 F.3d at 930; Ye, 436 F.3d at 1121-22 (establishing a
 15 five factor test to determine whether mandamus relief may arise under § 1651).

16 C. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH
 17 RELIEF MAY BE GRANTED

18 Alternatively, if the Court finds that it has jurisdiction, Plaintiff still fails to state a claim upon
 19 which relief may be granted. Plaintiff’s application may not be decided because his background
 20 investigation is not yet complete. Had it wished to do so, Congress could have enacted deadlines for the
 21 performance of the FBI’s background investigation and subjected this process to judicial review. In the
 22 absence of such a directive, USCIS has no clear, mandatory duty to adjudicate Plaintiff’s application at
 23 any particular time, or, in effect, to give preferential treatment to his application by processing it out of
 24 the order in which it was received. Further, Plaintiff has failed to establish that the FBI can be compelled
 25 to complete his background investigation. There is no statutory or regulatory requirement that the FBI
 26 complete the background check of an applicant within a certain time limit. See Norton, 542 U.S. at 63;
 27 see, e.g., Li, 482 F.Supp.2d at 1179 (“Plaintiff has not pointed to any statute or regulation requiring the
 28 FBI to complete her name check in any period of time, reasonable or not.”). Lastly, Plaintiff has failed

1 to establish that he has suffered any cognizable injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555,
 2 560-61 (1992). While his application is pending, Plaintiff retains all of the rights and benefits of a lawful
 3 permanent resident, including the right to work and travel freely. See Ex. A, ¶ 18. Because he has no
 4 clear right to immediate adjudication and Defendants' duty is purely discretionary, the extraordinary
 5 relief provided by mandamus is not warranted here. Accordingly, the Court should dismiss the
 6 Complaint for failure to state a claim upon which relief may be granted.

7 D. **IF JURISDICTION EXISTS, PLAINTIFF'S CASE SHOULD BE**
 8 **REMANDED TO USCIS**

9 The Secretary of Homeland Security has "sole authority to naturalize persons as citizens of the
 10 United States." 8 U.S.C. § 1421(a); 6 U.S.C. § 271(b). USCIS is the federal agency charged with
 11 processing applications for naturalization. See 8 U.S.C. § 1421 et seq. USCIS is required to conduct a
 12 personal investigation and examination of each applicant for naturalization. See 8 U.S.C. §§ 1446(a)-
 13 (b); 8 C.F.R. §§ 335.1-335.2. In situations in which there has been an examination by USCIS and 120
 14 days elapse without a decision whereby district court jurisdiction is not in dispute, Congress provided
 15 the Court with two options. See 8 U.S.C. § 1447(b). The Court retains exclusive jurisdiction over the
 16 application and may either determine it or remand it to USCIS with appropriate instructions. Id.; see also
 17 United States v. Hovsepian, 359 F.3d 1144, 1160.

18 Within the 8 U.S.C. § 1447(b) context, when there is a basis for jurisdiction, courts in this District
 19 have overwhelmingly elected to remand applications for naturalization to USCIS with instructions to
 20 adjudicate the application as expeditiously as possible after the FBI's completion of the name check. See
 21 Somo v. Gonzales, No 07cv0637, 2007 WL 2700948, *3 (S.D. Cal. Sept. 10, 2007); Penalosa v. U.S.
 22 Citizenship & Immigration Servs., No. 07cv0808, 2007 WL 2462118, *3 (S.D. Cal. Aug. 28, 2007); Ma
 23 v. Chertoff, No. 07cv0033, 2007 WL 2462103, *3 (S.D. Cal. Aug. 27, 2007); Yang v. Chertoff, No.
 24 07cv0240, 2007 WL 1830908, *4 (S.D. Cal. June 25, 2007); Ghazal v. Gonzales, No. 06cv2732, 2007
 25 WL 1971944, *4 (S.D. Cal. June 14, 2007). There are several advantages to remanding this matter to
 26 USCIS. The application will be adjudicated by the federal agency best equipped to evaluate the
 27 application. It will accomplish the congressional intent of uniform examination. See 8 U.S.C. § 1443(a)
 28 (the examination "shall be uniform throughout the United States"). Further, it will leave Plaintiff with

1 an avenue for judicial review under 8 U.S.C. § 1421(c) if the application is ultimately denied by USCIS.

2 If this Court finds that jurisdiction exists, it is appropriate to remand the matter to USCIS when
 3 the pendency of an FBI investigation precludes the interview of an N-400 applicant. Remand permits
 4 the agency to render a decision in the first instance based upon a complete administrative record. See
 5 Khelifa v. Chertoff, 433 F.Supp. 2d 836, 843-44 (D. Mich. 2006) (noting that CIS is better equipped than
 6 the federal courts to evaluate background investigation information, conduct follow up where necessary,
 7 and complete adjudications). Such an approach favors basic principles of administrative review as well
 8 as judicial economy because if judicial review is required under § 1421(c), the Court will have the
 9 benefit of the final and complete administrative record.

10 Here, USCIS undertook the processing of Plaintiff's N-400 immediately. Ex. A, ¶ 19. In addition
 11 to reviewing the information provided by Plaintiff, USCIS complied with agency directives and instituted
 12 a series of law enforcement checks. Id. at ¶¶ 5, 19-22. Accordingly, if the Court determines that
 13 jurisdiction is appropriate, then Defendants submit that remand is the procedure that honors the
 14 congressionally mandated administrative process applicable to naturalization applications, favors judicial
 15 economy, and does not deprive Plaintiff of judicial review in the event that, after a complete and requisite
 16 background check, his application is denied. 8 U.S.C. § 1421(c)

17 IV.

18 CONCLUSION

19 For the foregoing reasons, Defendants respectfully ask the Court to dismiss Plaintiff's Complaint.
 20 Alternatively, the Court should remand Plaintiff's Complaint to USCIS for adjudication after completion
 21 of the necessary background investigation.

22 Dated: May 5, 2008

23 Respectfully submitted,

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